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No. 263.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

CITY OF SAN ANTONIO, *et al*, APPELLANTS,

versus

SAN ANTONIO PUBLIC SERVICE COMPANY, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

Brief for Appellants, Defendants Below.

STATEMENT OF THE CASE.

The San Antonio Public Service Company, a Texas corporation, instituted this suit on the 27th day of November, A. D. 1918, against the City of San Antonio, Sam C. Bell, Mayor, Ray Lambert, Louis Heuermann, Andres Coy and Phil Wright, City Commissioners, and R. J. McMillan, City Attorney, and prayed for an injunction.

Plaintiff's petition after alleging that it was a private corporation, duly incorporated under the laws of the State of Texas, for the purpose of operating a street railway sys-

tem, which system it was engaged in operating in the City of San Antonio, Texas, and that the defendants cited constituted a Texas Municipal Corporation and the principal officers thereof further alleged as follows:

"That on or about the 16th day of March, A. D. 1899, the City of San Antonio passed an ordinance extending the time of the franchise rights and privileges to the San Antonio Gas Company, Mutual Electric Light Company; the San Antonio Street Railway Company, and the San Antonio Edison Company, and the ordinance among other provisions contained the following pertinent to the issues therein involved.

"The rights, privileges and franchises heretofore granted to and existing in the San Antonio Gas Company, Mutual Electric Light Company, San Antonio Street Railway Company and the San Antonio Edison Company shall be and are hereby extended from this date so that the rights, privileges and franchises of said companies shall exist until and shall expire on the first day of July, A. D. 1940. Said extension of time is granted to said Companies and upon the following terms and conditions, to-wit:

"Said San Antonio Street Railway Company and said San Antonio Edison Company shall, after their acceptance of the extension hereby granted, pave all tracks between the rails and all the space between double tracks, and twelve inches (12") on the outside of their tracks, on any street occupied by them, or either of them, which shall hereafter be paved by the City, as and when the City paves and with the same material as used by the City, and shall keep the same in reasonable repair and in like conditions as the City keeps adjoining streets.

"That said street railway companies shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other. (R-3).

"The rights, privileges and franchises, or either of them, herein referred to and hereby extended, may be assigned by the grantee or grantees to any person or corporation, but the conditions and limitations of this Ordinance shall apply to the assignee thereof. (R-3).

"Said companies or either of them, or their assigns, shall file with the City Clerk on or before the first day of May, A. D. 1899, its or their written acceptance of the terms and conditions of this Ordinance; otherwise this Ordinance shall have no force or effect. (R-4).

"Said Companies shall be subject to all Ordinances of this City, except in so far as such Ordinances conflict herewith. (R-4).

"That the provision of said ordinance above set out relative to charging a 'five cent fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other,' was not intended by the parties as anything more than a mere regulation of the rate for the time being and a fixing a rate of fare that was deemed just and reasonable under the circumstances and conditions existing at that time and was never intended as a contract; but plaintiff says that if it was intended as a contract, then, (1) The City has never been authorized by the Legislature of the State of Texas to make any such contract and had no power to make such a contract. Said provision, if intended as a contract was illegal and void because it was forbidden and prohibited by Section 7, Art. 1, of the Bill of Rights in the Constitution of the State of Texas, which provides that 'no irrevocable or uncontrollable grant of special privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.'

"Said provision, if intended as a contract was also illegal and void because contrary to public policy and was one calculated to deprive a public service corporation, un-

der conditions that might thereafter arise, of its ability to render adequate service to the public and same was an attempt to barter away the police power of the State and City with reference to regulating rates.

"That thereafter, to-wit, on or about the 4th day of April, A. D. 1900, the San Antonio Traction Company, a corporation duly incorporated under the laws of Texas, became the owner of all the rights, privileges and franchises of every kind and character conferred upon the San Antonio Street Railway Company by the terms of said ordinance and thereby became subject to the legal obligations therein imposed and thereafter on or about the 1st day of July, A. D. 1917, your petitioner the San Antonio Public Service Company, by and with the consent of the City Council of said City became the owner of all said rights, privileges and franchises granted under said ordinance and is still such owner." (R 4-5).

Petitioner continuing then alleged the reasonable value of its plant devoted to trackage purposes was in excess of six million, ninety-one thousand dollars, ($6,091,000.00) and that at the time of the passage of the Ordinance of March 16, 1899, the five cent (5c) fare then referred to was sufficient to pay operating expenses and a fair return on the investment, but that because of the increase in the cost of labor and operating expenses, incident to the European War, and the general advances in prices it was at the time of filing the bill, unable to pay a fair return on its investment.

Continuing the petitioner alleged: "That after the passage of the ordinance of 1899 the State passed what was commonly known as the Half Fare Law requiring it and other similar companies to transport certain children for half fare. That its predecessor, the San Antonio Traction Company contested this law in the Altgelt case, alleging that it impaired the obligation of its contract with the city

for a five cent (5c) fare. That its contention was overruled by all of the State courts and the Supreme Court of the United States. That since that time it has complied with said law to its great loss. That said provision in the ordinance of 1899 did not constitute a contract but was simply intended as a regulation. That if it was intended as a contract it was beyond the power of the city. Petitioner continuing alleges the passage by the city in 1903 of a half fare ordinance for children and the passage in 1907 of an ordinance requiring street railway companies to carry firemen and policemen free. It is not alleged that either of these ordinances was ever contested or even objected to.

Plaintiff further alleges that if the City of San Antonio ever intended the five cents fare provisions contained in the franchise ordinance of March 16th, 1899, as a binding contract, (which is not admitted but denied), then the said City by its act in passing and enforcing the Half Fare Ordinance above referred to, and in passing and enforcing the ordinance above referred to requiring the free transportation of policemen and firemen, and by its acts in recognizing the validity of and assisting in the enforcements of the Half Fare Law passed by the State of Texas, above referred to, and by ratifying and adopting same and by each of said acts, and by various other acts subsequent to the passage of the ordinance of March 16th, 1899, has repealed, abrogated and annulled said five cents fare provision in said ordinance and has long since recognized that it was no longer a binding provision in said ordinance and neither the said City nor this plaintiff nor its predecessor, the San Antonio Traction Company, has treated or regarded said provision as a binding contract since the final decision by the Courts in the Altgelt case above referred to and said City is now estopped by reason of each and all of its said acts from claiming that said provision is

binding on this plaintiff so as to prevent it from increasing its rate of fares to such point as will pay its operating expenses and a fair return on its investment." (R-8).

Petitioner then alleges that on the 20th day of March, A. D. 1918, the City of San Antonio passed an ordinance prohibiting any public utility company operating in the city, from raising its rates without first applying for and obtaining the consent of the Mayor and Commissioners and that having made such application in compliance with said ordinance, the petition had been by the Mayor and Commissioners, denied.

Continuing petitioner alleges:

"That, if your petitioner should raise the rate of fare to be charged by it for carrying passengers on its street railway above five cents, the said City and its Commissioners and City Attorney will undertake to forfeit its franchise and to impose the penalties provided for in said ordinance and by various other methods will undertake to prevent its doing so and will seriously interfere with and harass it in the operation of its properties and will subject it to numerous and divers suits and prosecutions for penalties and forfeitures and will undertake to forfeit its charter and cast a cloud upon its right to operate said street railway system; and will institute numerous prosecutions against its officials to enforce penalties under said ordinance, all of which will materially injure if not destroy the credit of this plaintiff and will materially interfere with its performing its duty to the public and rendering adequate service to the public of San Antonio and will materially interfere with it in the operation of its plant and cause it serious and irreparable injury and damage for which it will have no adequate remedy at law."

"Plaintiff desires now to raise the rate of fare to be charged to passengers to seven (7c) per passenger for adults and to one-half that amount for the persons required

by the State Half Fare Law to be carried at half fare or to such other sum as the Court may find will be necessary in order for it to earn its operating expenses and a fair return on its investment, but it is unable to do so because of said ordinances and of the threatened injury and damage by the City and its Commissioners as hereinbefore set out, which is all that prevents plaintiff from at once so raising its said rates."

"Plaintiff shows that said ordinances are contrary to the Constitution of the United States and void in so far as they interfere with and prohibit it from raising its rates of fare to such a point as will enable it to earn its operating expenses and a fair return on its investment, and the enforcement thereof will deprive this plaintiff of its property without due process by law in violation of the constitution and laws of this State and of the United States and particularly in violation of that portion of Section One of the Fourteenth Amendment to the Constitution of the United States which provides that 'No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States. Nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.' And also in violation of that portion of the Fifth Amendment of the Constitution of the United States which provides that no person shall be 'deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation'; (R-11) and concluding plaintiff prays for an injunction restraining the City of San Antonio and its officers from interfering with it in any way and putting into force and effect a seven cents (7c) fare for adults and one-half (½) of that amount for the class of passengers required by the

State Half Fare Law, to be carried for half fare and for general relief," etc.

The petition was verified and had attached as exhibits various ordinances referred to therein, among others an ordinance passed by the City after the passage of the State Half Fare Law requiring street railway companies to carry children for a two and one-half cent (2½c) fare, and an ordinance requiring street railway companies to transport free of charge persons serving in the police and fire departments, of both of which ordinances petitioner complained in its original bill; against the latter ordinance, however, it at no time asked for any relief.

After the filing of the original bill with leave of the Court, plaintiff filed a First Supplemental Bill alleging an additional increase in expenses due to a raise in wages and later with leave of the court and by agreement of parties, it filed an amendment to its original bill setting up certain penal ordinances passed by the City of San Antonio subsequent to the granting of the franchise of 1899, said penal ordinances requiring in effect that street railway companies transport passengers for a fare of five cents (5c).

Appellants, defendants below, filed a motion to dismiss and challenged the jurisdiction of the court as follows:

"Respondents move the Court to strike out and dismiss the bill filed by complainant in this case, and to proceed no further with same for the reason that said bill shows upon its face that this case is not within the jurisdiction of this court, and because the allegation that this Court has jurisdiction is fictitious and fraudulent and because a valid cause of action in equity is not stated in the bill."

"Respondents would further show to the Court that Complainant, in paragraph four of its bill, alleges that on or about the 1st day of July, A. D. 1917, it became, with the consent of the City of San Antonio, the owner of all

of the rights, privileges and franchises previously granted to the San Antonio Traction Company. Complainant has failed to attach to the bill a copy of said ordinance consenting to the transfer of such rights to the complainant, and respondents here now attach a certified copy of said ordinance to this plea and mark same Exhibit "A", for identification. That by the terms of said ordinance, which was accepted by the San Antonio Public Service Company, all of the limitations, duties, contracts, forfeitures and obligations imposed on or required of the San Antonio Traction Company at the time when same was passed, to-wit, the 10th day of July, A. D. 1917, were imposed on and required of the San Antonio Public Service Company. A certified copy of Complainant's acceptance of said ordinance it attached hereto. That at said time there was a valid city ordinance in effect requiring the transportation of passengers by street railway companies for (5c) five cents, with transfers. Accordingly respondents represent to the Court that the City of San Antonio, in demanding of complainant a compliance with its agreement, simply requires of it the performance of its own valid contract, voluntarily entered into. That the demand upon the part of the City of San Antonio is not a taking of complainant's property without due process of law, and accordingly there is no federal question in this case, of such a character as to confer jurisdiction upon this Court." (R 20).

To this plea was attached the ordinance referred to therein which, omitting its formal portions, is in part as follows:

"The San Antonio Traction Company and the San Antonio Gas & Electric Company are hereby granted full and complete right and authority to transfer and assign unto the San Antonio Public Service Company, a corporation incorporated under the laws of the State of Texas, with its principal office in the City of San Antonio, Bexar County,

Texas, all rights, privileges and franchises of any and every nature whatsoever heretofore granted to and now existing in and enjoyed by the San Antonio Traction Company and San Antonio Gas & Electric Company; said transfer and assignment to be made within ninety days after this ordinance shall become effective.

"The rights given to said Companies in Section 1, are subject to the conditions hereinafter set forth. All the limitations, duties, contracts, forfeitures and obligations imposed on or required of either of said companies at this time shall be imposed on and required of the San Antonio Public Service Company.

"The San Antonio Public Service Company hereby agrees that it will cause a line to South San Antonio, Bexar County, Texas, to be built and in actual and continuous operation, within ninety days from the date upon which this ordinance becomes effective.

"The ordinance shall not take effect until the San Antonio Public Service Company shall, by proper resolution, filed with the City Commissioners of San Antonio, accept all the provisions and limitations of this ordinance, which acceptance shall be filed on or before ninety days after the final passage of same.

"Passed and approved this 10th day of July, A. D. 1917." (R 22).

There was also attached a copy of written acceptance filed on the 14th day of August, 1917, by the San Antonio Public Service Company, which contained the certificate of R. C. Jones, its Secretary, to the effect that at a meeting of the Board of Directors of said Company held on August 11, 1917, the ordinance was accepted without reserve.

Defendant's plea to the jurisdiction and motion to dismiss coming on to be heard, same was overruled by the Court and a memorandum opinion handed down which is on pages 26 to 30 inclusive of the record. It is unnecessary

accordingly, to quote this opinion further than to say the Court held that neither the franchise ordinance of 1899 nor the consolidation ordinance of 1917 constituted a contract between the city and the railway company; that the city was without authority to enter into an agreement of this character should it be construed as an agreement; that a cause of action for equitable relief was stated upon the face of the bill. An order pursuant thereto was accordingly entered and the defendants given ten (10) days from February 20, 1919, in which to answer. Within that time the respondents filed their answer reserving therein all rights under their plea to the jurisdiction and motion to dismiss and in such answer among other things pleaded as follows:

"Respondents move the court to strike out and dismiss complainant's bill because same shows upon its face that complainant is attempting to enjoin respondents from requiring of complainant performance of its own voluntary contract and undertaking, to transport passengers during the life of its franchise contract with the City of San Antonio for a five cent fare with universal transfer.

"Respondents move the Court to strike out and dismiss complainant's bill because same is lacking in equity and shows upon its face that the complainant is not entitled to the relief prayed for, or to any relief whatsoever.

"Further answering, and in bar of complainant's cause of action in this case, respondents represent to the Court that complainant's predecessor, the San Antonio Traction Company, voluntarily asked the City of San Antonio for and accepted a forty-year franchise, granting the privilege to use certain streets and public places of the City for the street railway business. That said franchise contract contained, among other provisions, the one set out in complainant's bill, requiring complainant's predecessor to transport passengers within the City of San Antonio for five cents with universal transfer.

"That after this franchise was granted and accepted, some question arose as to its validity. That the City of San Antonio, acting in good faith in the matter, passed a confirmatory ordinance confirming said franchise in and to complainant's predecessor, said confirmatory ordinance containing a provision that the franchise was subject to all existing ordinances of the City of San Antonio and its own terms, and this confirmatory ordinance was expressly accepted by complainant's predecessor and at said time there existed, in addition to the Traction Company's agreement to haul passengers for a five cent fare, a city ordinance requiring same and providing for a universal transfer.

"That when the State passed the Half Fare Bill, complainant contented itself with litigating the question out with a private individual, and upon the termination of that litigation, adversely to it, made no offer to surrender its franchise, took no legal steps of any character whatsoever with regard to the City, but continued to exercise such franchise, complying with the provision for hauling passengers for five cents with universal transfer, and complying with the State Half Fare Law.

"That this condition existed for a period of some twelve or fourteen years, when, in July, 1917, the San Antonio Gas & Electric Company and the San Antonio Traction Company petitioned the City of San Antonio to permit them to transfer their franchise rights to the San Antonio Public Service Company, representing, which was a fact, that they could not make the transfer of these franchises without the consent of the City, and further representing that the right to so consolidate would be an extremely valuable privilege to them, which would in no way affect the public to its detriment.

"That the City of San Antonio granted to these companies the right prayed for upon certain conditions, which were set out in an ordinance a copy of which is hereto at-

tached, marked Exhibit "A", which ordinance contained among other provisions, the following one:

" 'The rights given to said companies in Section 1 are subject to the conditions hereinafter set forth. All the limitations, duties, contracts, forfeitures and obligations imposed on or required of either of said companies at this time shall be imposed on and required of the San Antonio Public Service Company.'

"This ordinance was by the San Antonio Public Service Company by resolution of its Board of Directors duly accepted and written acceptance of same filed with the City Clerk. This petition for consolidation and this acceptance of this ordinance occurred during the summer of 1917, and at and about just the time when complainant now alleges it was losing money.

"Respondents would show to the court that when complainant applied for and accepted this consolidation ordinance the State Half Fare Law was in existence and had been in existence for some thirteen or fourteen years. That the City ordinance requiring the hauling of passengers for five cent fare was in existence and had been in existence for many years; and both were being complied with by complainant's predecessor. That the franchise contract for a five cent fare with universal transfer was in existence and was at that time being complied with by the San Antonio Traction Company. That respondents thought and believed at the time that there was no question as to the binding force and effect of the five cent fare provision; that no complaint was made in regard to the same by the Public Service Company in asking for this valuable privilege, and no protest with regard to the existence of the half-fare law or the city ordinance was urged when the City was being asked to give them this valuable right.

"That at the time the constitution of the State of Texas had been amended granting to cities and towns of over five

thousand inhabitants the right of self-government and home rule, and under such constitutional amendment the exclusive control of the streets and alleys and other public places of such cities, had been delegated by the Legislature of the State, together with the right to regulate street railway transportation within the city limits and to annex such conditions to franchise rights for the use of such streets as might by the cities be deemed necessary or desirable.

"Respondents would show to the court that this agreement upon the part of the Traction Company to haul passengers for five cents with universal transfer was one of the principal considerations moving to it for the granting of this franchise. Should the court hold that the complainant is entitled to continue to operate upon its streets, charging a higher or different rate of fare than that agreed upon in the contract, then the Court in effect makes a new contract between the City and the Company, and grants to the Company rights which the City would not have granted to it and which it does not care to have it exercise upon its streets and public places.

Respondents would show to the Court that the complainant because of its action in the premises, is estopped to question the right of the City to make this contract or to annex this condition to this franchise grant, in that the complainant by applying for and accepting this consolidation ordinance under the conditions outlined bound itself to exercise its franchise in the manner provided for, and in no other manner whatsoever, and said complainant is without standing in this Court as a court of equity, and this Court will not interpose the equitable remedy of injunction on behalf of the complainant under these circumstances." (R-32).

Defendants filed certain denials relating to the various allegations in the original bill, the cost of operating the property, etc., and prayed, as they have heretofore prayed,

that the rate prayed for be denied. This answer having been filed, the Court being of the opinion that the cause could be more expeditiously handled by reference, it was upon the 5th day of May, 1919, referred to a Master with instructions to take proof with respect to the issues involved and report his findings of law and fact. (R 38).

A great volume of testimony, both oral and documentary was taken before the Master whose report was not filed until August 27th, 1919, almost four months later. (R 38-92).

The Master reported the following legal conclusions among others to the Court:

"The power to prescribe the rates to be charged by persons and corporations engaged in the performance of a public service is legislative in its nature, and may be delegated to a commission. In the exercise of this power the legislature or commission may do anything, or prescribe any rule or rate they please, within the limit that the act done, rule or rate prescribed shall not operate to deprive the regulated person or corporation of property without due process of law, or to deny them the legal protection of the law.

"The limitation stated fixed the power and authority of the Courts to interfere, and prescribes the bounds within which they may exercise their functions. They can interfere with the legislative function only when it is found that constitutional guarantees have been impinged or denied.

"In interposing their authority and power, the Courts have no discretion to exercise. When it is said that the Courts have the power to inquire whether a body of rates prescribed by the legislature or a commission are unjust and unreasonable, what is meant is that they may do this when the rate prescribed is unjust and unreasonable to the extent that it works a practical destruction of rights of property.

"The Courts do not possess the power to revise or change the rules or rates prescribed, nor determine whether one is preferable to another; nor what is fair and reasonable under the circumstances of particular cases."

"A person or corporation engaged in a public service is entitled to a fair return upon the value of that which is employed in the public service; but the mere fact that it is unable to do this is not conclusive that the rate prescribed is unjust or unreasonable, in the constitutional sense."

"While the public service company is entitled to a fair return, this is limited by two things, (a) that there is no public guarantee, and (b) if it is unable to earn a fair return, when that is due not to the rate itself but to conditions over which the legislature or commission has no control, the Courts cannot interfere. The Constitution contains no guarantee against losses due to competition or adverse conditions of market with respect to the cost of labor, material or supplies."

"The Courts are authorized to intervene in such cases only because of some definite, affirmative action by the legislature or commission." (R-51).

He stated further, as a matter of fact that the Company was not at the time getting a return on its investment and probably would not do so for several years (R 88); that the rate was reasonable when fixed by the franchise ordinance and that the conditions that prevented its now yielding a fair return were the increase in wages, the increase in cost of material, and operating, the great advances in all commodities caused by the war and jitney competition; and that in his opinion the court was without jurisdiction or authority to entertain the bill under the circumstances, and he recommended that the bill be dismissed. The Master's report is very full and covers the various matters of valuation, replacement, reserve, depreciation, etc., but it is unnecessary to dwell upon these features in the present stage of the case.

To the Master's report the plaintiff filed some thirty-two (32) exceptions. The various exceptions having a number of sub-heads. (92-111).

The Court on the hearing of the exceptions to the Master's report, confined same to the sole question as to his recommendation that the bill be dismissed. Upon this hearing Judge West handed down a memorandum opinion sustaining the exceptions to the Master's report in so far as he recommended the dismissal of the bill, and upon that opinion an order was entered on the 3rd day of November, 1919, in accordance therewith, to which the defendant excepted. Following this order a final decree was entered in the case enjoining the defendants and each of them and their successors from enforcing the various ordinances complained of by the petitioner, and taxing all the costs incurred against the said defendants. Exception was taken by the defendants and notice of appeal given. (R 117).

The evidence introduced in the case on the plea to jurisdiction and motion to dismiss and before the special Master upon reference established the following:

"Prior to March, 1899, the San Antonio Gas Company, the Mutual Electric Light Company, the San Antonio Street Railway Company and the San Antonio Edison Company were public utility companies, duly incorporated under the laws of the State of Texas and exercising the franchises granted to them by the City of San Antonio in and upon the streets, etc., of said city. The San Antonio Street Railway Company and the San Antonio Edison Company were incorporated for the purpose of constructing, owning and operating street railway systems in the City of San Antonio, and by virtue of franchises theretofore granted by said city were on March 16, 1899, and prior thereto operating lines of street railway on the streets of said city.

Upon the request of said companies and at the date last named, to-wit, March 16, 1899, the City Council of said city enacted an ordinance whereby it extended said

rights and privileges and the franchises of the said companies from 1924 to the first day of July, 1940. Said ordinance contained among other things the following two provisions: (1) "That said Street Railway Companies shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other;" "Section 4, Said companies or either of them or their assigns shall file with the City Clerk on or before the first day of May, A. D. 1899, its or their written acceptance of the terms and conditions of this ordinance; otherwise this ordinance shall have no force or effect" A true copy of said complete ordinance of March 16, 1899, is set out in Complainant's Original Bill of Complaint. Each of said companies, acting through their duly accredited agents and officers, with authority from their board of directors, duly filed with the City Clerk within the time limit fixed by the ordinance their written acceptance of the terms and conditions of same.

At the time of the passage of said ordinance and the acceptance of same by the said companies the charter of the City of San Antonio, granted to it by the Legislature of the State of Texas, then in force, contained the following provisions: "Be it enacted by the Legislature of the State of Texas: That all inhabitants of the City of San Antonio are hereby constituted a body corporate and politic, and shall have power • • • Sec. 99. To direct and control the laying and construction of railroad tracks, turnouts and switches, or prohibit the same in the streets, avenues and alleys, and location of depot grounds within the city to require that railroad tracks, turnouts and switches shall be so constructed as to interfere as little as possible with the ordinary travel and use of the streets, avenues and alleys and that sufficient space shall be left on either side of said tracks for the safe and convenient passage of teams, carriages and other vehicles and persons;

to require railroad companies to keep in repair the streets, avenues, or alleys through which their track may run, and if ordered by the City Council to light the same and to construct and keep in repair suitable crossings at the intersections of streets, avenues and alleys, and ditches, sewers and culverts, when the City Council shall deem necessary to direct the use and regulate the speed of locomotive engines within said city or prevent or prohibit the use or running of the same within the city.

Section 100. Exclusively to prevent, control and regulate everything connected with city railroads, and to make such rules and regulations for the same as the City Council may deem necessary."

The Legislature of the State of Texas on April 10th, 1903, enacted what is known as the "Half Fare Law," requiring street railway companies in cities and towns of not less than forty thousand inhabitants to carry children under twelve years of age for one-half fare charged adults and to issue tickets in lots of twenty to school children under seventeen years of age for one-half the fare charged adults and to carry children under five years of age, attended by a passenger above that age, free of charge, and provided a penalty for violation thereof.

On November 17, 1903, the City of San Antonio enacted an ordinance requiring the street railway companies in said city to carry school children under the age of twelve (12) years for two and one-half cents (2½)c) each and to sell tickets to students under seventeen years of age in the manner required by the said "Half Fare" Law above referred to. Said ordinance provided for penalties, and a true copy of the same is set out in full as Exhibit C, Plaintiff's Bill of Complaint.

The City of San Antonio was at the time of the passage of said State "Half Fare" Law and is still a City of over forty thousand inhabitants and said act applies to all street

railways operating in this City. This act of the Legislature was contested by the San Antonio Traction Company, which had succeeded to the rights of the San Antonio Edison Company, and the San Antonio Street Railway Company, on the ground that the provision in the franchise ordinance of March 16th, 1899, as to fares constituted a contract. The case in which this contest was made was that of George Altgelt vs. San Antonio Traction Company, filed in the District Court of Bexar County, Texas. Judgment was rendered against the Company in the District Court and an appeal was taken by it to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, where said judgment was affirmed in an opinion reported in 81 Southwestern Reporter, page 106, styled San Antonio Traction Company vs. Altgelt. A writ of error was taken to the Supreme Court of the United States, where the decision of the Texas courts was affirmed in the case of San Antonio Traction Company vs. Altgelt, 200 U. S., page 304, and ever since the date of the decision of the Supreme Court of the United States the San Antonio Traction Company and its successor, the San Antonio Public Service Company, have complied with the terms of said statute and said City Ordinance and carried the persons therein designated for two and one-half cents (2½c) and children under five years of age, attended by a passenger above that age, free.

The said State Half Fare Law has never been repealed or modified and is still in full force and effect, and the said City ordinance has never been repealed or modified, unless the ordinance of October, 1918, set out as "Exhibit B" to plaintiff's Bill of Complaint, had the effect of modifying it.

On June 24th, 1907, the City of San Antonio enacted an ordinance requiring street railways in said City to transport and carry free of charge all persons serving in the Police and Fire Departments, while on duty and in uniform,

or provided with written authority by the City Marshall or the Chief of the Fire Department. Said ordinance provided for penalties. A true copy of same is attached to Plaintiff's Original Bill of Complaint and Marked "Exhibit S".

The Plaintiff and its predecessor, the San Antonio Traction Company, have both complied with said ordinance since the passage thereof.

Prior to April 4, 1900, the San Antonio Traction Company was incorporated under the laws of the State of Texas, for the purpose of owning, constructing and operating a street railway system in San Antonio, and upon that date became the owner of all the rights, privileges and franchises of the San Antonio Street Railway Company and the San Antonio Edison Company, and thereafter, up to the time the San Antonio Public Service Company became the owner, owned and operated a street railway system in said City under and by virtue of said rights and franchises. On or about July 1, 1917, the plaintiff, the San Antonio Public Service Company, complainant in this case, was incorporated under the laws of the State of Texas.

During the month of July, 1917, the San Antonio Traction Company and the San Antonio Gas & Electric Company filed their petition with the City of San Antonio, praying that the city grant them the right to assign to the San Antonio Public Service Company all of the rights, privileges and franchises of any and every nature enjoyed by the Traction Company and the Electric Company. By ordinance of July 10, 1917, a true copy of which is attached to respondent's plea to the jurisdiction and motion to dismiss, marked "Exhibit A", the City of San Antonio granted said prayer, but provided by said ordinance evidencing said grant that all the limitations, duties, contracts, forfeitures and obligations imposed on or required of either of said companies at that time should be imposed on and required

of plaintiff and provided further that the ordinance should not take effect until plaintiff should accept all the provisions and limitations of the ordinance within ninety days after the final passage of same. The Complainant, the San Antonio Public Service Company, duly accepted said ordinance upon the terms and subject to the limitations therein set out, a true copy of such acceptance is attached to Respondent's Plea to Jurisdiction and Motion to Dismiss, and thereupon became and is still the owner of all the rights, privileges and franchises theretofore owned and enjoyed by said San Antonio Traction Company and said San Antonio Gas & Electric Company.

At that time the City Charter gave the Commissioners power under Section 95: "To exclusively control and regulate everything connected with street railways and to make such rules and regulations for the same as the Commissioners may deem necessary."

Prior to March 16, 1899, there was enacted a city ordinance in effect requiring street railway companies within the City of San Antonio to transport passengers for a five cent fare with transfers to other lines of the same company; a true copy of this ordinance it attached to plaintiff's First Amendment to its Original Bill filed July 26, 1919, marked "Exhibit D". This ordinance has never been repealed and was in force on March 16, 1899, and also on July 1, 1917, and remained in force until October 3, 1918.

The San Antonio Traction Company was in July, 1917, transporting adult passengers within the city limits of the City of San Antonio for a fare of five cents and giving universal transfer, and was carrying the persons designated in the State Half Fare Law for half fare and children under five years of age free when attended by a person above five years of age, all as required by aforesaid statute and ordinance, and no question was raised or complaint made with regard to this rate of fare by said Traction Company

or the San Antonio Public Service Company at the time that the application was made for the right to consolidate the franchise of the Gas and Electric Company and the Traction Company by assigning same to the Public Service Company, or at the time said petition was granted or accepted.

Prior to the time when petition was made by the Gas and Electric Company and the Traction Company to transfer their franchises to the San Antonio Public Service Company, the City of San Antonio had amended its charter, to-wit, in 1914, as provided for by what is commonly known as the Home Rule Amendment of the Constitution of the State of Texas, authorizing cities and towns over 5000 people to adopt, alter or amend their own charter by public election, and this charter contained the same provisions with reference to the regulation and control of street railways as hereinbefore set out.

On March 28, 1918, the City of San Antonio passed an ordinance forbidding any public service company, enjoying any public franchise or privilege in the City of San Antonio, changing or raising its rates without first filing application with the Mayor or Commissioners and obtaining permission, and denouncing certain penalties for the violation of said ordinance; a true copy of said ordinance marked "Exhibit A", is attached to Complainant's Bill of Complaint.

On August 29, 1918, Complainant, the San Antonio Public Service Company, filed a petition with the City of San Antonio alleging that the price of labor, materials and the burden of taxation had been greatly increased since the war and that by reason of the increased cost of maintenance and operation, the traction department of plaintiff could not earn enough to make the expenses of maintenance and operation and a reasonable return on its investment, and prayed that the rate of fare should be fixed

by the City at present at six cents with universal transfers inside the City limits, or that the rate of fare be fixed at five cents to and from the center of the city to any point on the car lines inside the city limits, and that transfers and crosstown lines routing on a five cent fare be eliminated. This petition was denied by the City by ordinance passed during the month of October, 1918, a true copy of which is attached to Complainant's Original Bill of Complaint, and marked "Exhibit B". After the denial of this petition motion for rehearing was filed before the Mayor and Commissioners and this was also denied, and suit was then instituted in the present case. On said hearings before the City Commissioners, plaintiff introduced in effect the same evidence as was introduced in this trial and no evidence was offered by the City.

Complainant, the San Antonio Public Service Company, furnishes gas and electricity and street car service to the citizens of San Antonio and people residing in the suburbs adjacent to the City.

A detailed statement of the result of operations for all of the years beginning with 1902, in the Traction Department occurs on page 51 of the Master's report.

There was no evidence introduced either pro or con with regard to the operating expenses and revenues of the gas and electric department. For the years 1918 and 1919 the net operating revenue found by the Master on the reasonable value of the property as found by him within the city limits were 4.36% for the year 1918 and 3.88% for the year 1919. That during the year 1919 and probably for several years the company will not, at the present fare earn the rate of return upon the value of its property found by the Master to be reasonable. (R. 118).

The various provisions of the Charter in effect in 1899 and 1917 other than those hereinbefore set out, having been agreed upon by the parties, will be set out and re-

ferred to in the argument but we deem it unnecessary to mention them further here.

This case has been brought to this Court by appeal, the jurisdiction of the District Court being challenged and the construction and application of the Constitution of the United States being involved.

Appellant filed the following specifications of error:

SPECIFICATIONS OF ERROR.

1. The Court erred in holding that it had jurisdiction in this case.

2. The Court erred in over-ruling the Defendant's plea to the jurisdiction and motion to dismiss.

3. The Court erred in holding that the franchise ordinance of 1899 and the consolidation ordinance of 1917 did not constitute a binding contract and agreement precluding the Complainants from maintaining this action.

4. The Court erred in taking jurisdiction in this case and in refusing to dismiss same on motion, because complainant's petition showed upon its face that it was attempting to enjoin the City from demanding the compliance by Complainant with its own contract, voluntarily entered into, and accordingly there was no taking of property without due process of law, and the bill is without merit or equity, and the court without jurisdiction.

5. The Court erred in issuing the writ in this case, because the undisputed evidence shows that the Complainant the San Antonio Public Service Company was endeavoring to avoid by an injunction compliance with the contract made by it and its ancestor in right, the San Antonio Traction Company.

6. The Court erred in issuing the writ herein because, even should it be held that the franchise ordinance of 1899 and the consolidation ordinance of 1917 did not constitute a contract, said ordinance contained provisions with regard to the rate of fare, which at least constituted limitations and conditions annexed to the grant, which, the City, having under its charter the exclusive control over its streets, had the right to annex and which Complainant could not repudiate at the same time asserting its other rights based upon the same grant.

7. The Court erred in issuing the writ because even if it be held that the franchise provision and agreement for a five cent fare, with transfers was abrogated or invalidated by the State Half Fare Law, still the Complainant, the San Antonio Public Service Company, ratified, confirmed and re-accepted such provision and all existing conditions by applying for and accepting the Consolidation Ordinance of July, 1917.

8. The Court erred in issuing the writ and holding that the City had no power to make a contract for rate of fare, because even should it be held that such was the case under the law as it existed in 1899, the same was not true in 1917, when the San Antonio Public Service Company applied for additional privileges and was granted same.

9. The Court erred in failing and refusing to confirm the Master's report.

10. The Court erred in overruling the Master and disaffirming his report in so far as he held that the Court was without power to issue the writ under the facts existing in this case and recommended that the Court dismiss the case.

11. The Court erred in disaffirming the report of the Master in issuing the writ, because under the facts as found

by the Master the Court was without jurisdiction in the case and could not grant the relief prayed for.

12. The Court erred in granting a writ in this case, because in July, 1917, when the Complainant, the San Antonio Public Service Company, succeeded to the franchise of the Traction Company and the Gas and Electric Company, it entered into a contract with the City of San Antonio, whereby it renewed the original agreement of its predecessor for a five-cent fare, with universal transfer, and further agreed to be bound by all of the limitations, duties, contracts, forfeitures and obligations imposed on or required of its predecessor at that time. At that time the City of San Antonio had amended its charter under the Home Rule Amendment to the Texas Constitution, and was a self-governing and independent municipality and did not derive its authority or powers from the Texas Legislature. It accordingly had the unquestioned authority to make this contract and agreement, and both it and the Complainants were bound by same.

13. The Court erred in granting the writ of injunction in this case, because under all of the facts of the case as shown by the exhibits to the pleadings and evidence before the court on the motion to dismiss, and evidence before the Master, Complainant was not entitled in equity to the relief prayed for. (R-125).

ARGUMENT.

Appellants contend in this case:

FIRST: That the Court was without jurisdiction, which fact was apparent upon the face of the bill, same clearly showing that the Company was attempting by injunction to escape complying with its valid contract for a five-cents fare (5c) with transfer; that accordingly there was no

taking of its property without due process which was the only Federal question attempted to be raised.

SECOND: The Court erred in retaining jurisdiction after hearing the plea and motion to dismiss because the uncontroverted evidence showed (a) a valid contract granted by the franchise ordinance of 1899, and consolidation ordinance of 1917, (b) a valid condition and limitation annexed on and to the franchise grant providing for a five-cents (5c) fare with universal transfer.

THIRD: If it be held that the Court had jurisdiction, still the Court erred in issuing the writ upon final hearing upon the ground that plaintiff was being deprived of its property without due process for the reason the uncontroverted evidence showed that the plaintiff had bound itself by a valid contract agreeing to the rate of fare which it sought to enjoin.

FOURTH: The Court erred in ruling that the provisions in the franchise ordinance of 1899 for a five-cents (5c) fare did not constitute a contract and that if it did the city was without power to make same for the reason that even should it be held that the city was so disabled in 1899 that disability would not exist in 1917, when plaintiff applied for, received and accepted the consolidation ordinance, the Home Rule Amendment to the Constitution of the State of Texas, having in the meantime been passed, and Section 17, Bill of Rights no longer having application to the City of San Antonio.

FIFTH: The Court erred in issuing the writ because even should it be held that the franchise ordinance of 1899 and the consolidation ordinance of 1917 did not constitute a contract the ordinances contained provisions with regard to rate of fare which at least constituted limitations and conditions annexed to the grant which the city under its

charter having exclusive control of its streets had the right to annex under the settled decisions of the Court of last resort of the State of Texas, and Complainant could not repudiate same and at the same time assert other rights based upon the same grant.

SIXTH: That the Court was in error in refusing to confirm the Master's report and dismiss the bill for the reason that under the facts as stated by the Master and which will be set out more fully hereafter, the Court was without jurisdiction to grant the relief prayed for.

I.

JURISDICTION OF THE FEDERAL COURT.

At the outset the defendants challenged the jurisdiction of the court by filing a plea to the jurisdiction and motion to dismiss. All of the parties to this litigation are citizens of the State of Texas, accordingly jurisdiction must be predicated upon some other ground than diversity of citizenship, and it is obvious that the only ground relied upon is the deprivation of property without due process of law. Defendants, as such, asserted in the Court below and, as appellants, assert here that such question does not arise in the case.

The facts involved have been fully set out under the statement of the nature and result of the case and it is, of course unnecessary to do more than refer to them in the course of this argument.

The plaintiff, Company's predecessor, applied for and in 1899 accepted a forty (40) year franchise entitling them among other things to operate a street railway in the City of San Antonio which franchise contained the provision that they should charge a five-cent (5c) fare with universal transfer. In 1917, this franchise having passed into the hands of the San Antonio Traction Company, and the San

Antonio Gas and Electric Company, they made application to transfer same to the plaintiff in this case, San Antonio Public Service Company. This application was granted by the City with the provision that all the "limitations, duties, contracts, forfeitures and obligations imposed on or required of either of said companies at this time shall be imposed on and required of the San Antonio Public Service Company." This 1917 ordinance in common with the franchise ordinance of 1899 contained a provision that it should not be effective until accepted in writing by the grantee. The written acceptance in each instance was filed. The appellants contend that these ordinances constituted a contract between the City and the San Antonio Public Service Company and this contract is shown upon the face of the bill. The question as to whether a contract in fact existed and the authority of the city to make it will be more fully discussed in the argument as to the action of the court upon the merits of the case, but it is probably appropriate here to cite some of the reasons and authorities for our position at this time.

The City Charter in effect in 1899, Sec. 1, Art. 4, gave to the City "the right to make contracts." Section 99, "to direct and control the laying and construction of railroad tracks within the city," etc. Section 100, "exclusively to control and regulate everything connected with the city railroads," etc. Section 103, "the right to pass all ordinances not contrary to the Constitution, necessary for the good government of the city or carry into effect the powers vested therein," etc.

The Constitution of the State of Texas, Article 10, Section 7, forbade the Legislature granting the right to construct or operate a street railroad within any city without first having acquired the consent of the local authorities.

In 1912 the Constitution of the State was amended so as to provide that cities having more than five thousand (5000) inhabitants might adopt their own charters, provided that no charter should contain any provision inconsistent with the Constitution or general laws of the State.

These various provisions will be more fully set out later. There was no inhibition in the City Charter, the laws of the State or the Constitution of the State against making a contract of this kind, and on the contrary the right and authority to contract in this way clearly resided in the city as evidenced by the decisions of the Courts of Texas which we will hereafter cite to this Court. The only possible objection that might be urged against the right to make this contract was the provision contained in Article 17 of the Bill of Rights, Constitution of the State of Texas, to the effect that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof." This provision does not forbid the making of a contract, and it will be noted that the same when made is binding not only upon the company, but upon the city, and under the construction placed upon the article by the Supreme Court of Texas, the grant was simply rendered subject to future regulation or control by the Legislature of the State,

Mayor et al, vs. Houston Street Railway, 83 Texas, 548.

On the motion to dismiss for want of jurisdiction, the evidence showed as stated, that in 1917 the franchise was assigned with consent of the city, to the complainant, Public Service Company, and it agreed to be bound by all the limitations, duties, contracts, etc., imposed on or required of its predecessors at that time. When this agree-

ment was made the Constitution of the State had been amended by the passage of what is known as the Home Rule Amendment granting to cities of over five thousand (5000) people, the right of local self government. This amendment was passed in 1912 and the City of San Antonio came under it by reason of the fact it had amended its charter in compliance therewith, and accordingly it derived its authority and powers not from the Legislature but from the sovereign. XYDIAS AMUSEMENT CO. VS. CITY OF HOUSTON, 185 S. W., 415. Could it be held that Section 17 of the Bill of Rights placed the city under any disability in 1899 to make a contract of this character, that disability had certainly been removed in 1917 for the reason that the inhibition contained in Section 17, of the Bill of Rights is against the Legislature or governmental agency acting under its authority, and not against a "home rule city."

When the complainant company accepted the consolidation ordinance of 1917 its predecessor was complying with the franchise agreement for a five cents (5c) fare with universal transfer, there was a city ordinance as shown by the Statement of Evidence requiring the carriage of passengers for a five cents (5c) fare with transfer, the State Half Fare Law was in existence and its validity save in case of confiscation had been settled by the Altgelt case. These were, each and all of them, requirements and obligations imposed on and required of Complainant's predecessors at that time. The San Antonio Public Service Company accepted this ordinance in writing and without reserve. It seems clear to appellants that even should it be held that a binding contract had not been made in 1899, which fact is not admitted, but denied, still unquestionably such a contract was effected by the consolidation ordinance of 1917.

That the cities of the State of Texas had authority to enter into a franchise contract of this character and that

these franchises, which were accepted by the grantees in writing, constituted contracts, is amply shown by the decision of the Courts of last resort in this State.

Athens Telephone Co. vs. City of Athens, 182 S. W., 42, writ refused by Supreme Court.

City of Terrell vs. Terrell Electric Light Co., 187 S. W., 966,

Texarkana Gas & Electric Co. vs. City of Texarkana, 123 S. W., 213,

Mayor et al, vs. Houston Railway, 83 Texas, 548,

Rio Grande Railroad vs. Brownsville, 45 Texas, 88.

If appellants be correct in their contention that a valid contract was made either by the franchise ordinance of 1899 or the consolidation ordinance of 1917 and that contracts of this character were recognised and enforced by the Courts of last resort of this State, there was no taking of complainant's property without due process of law and accordingly there was no Federal question in the case.

In the case of DEFIANCE WATER COMPANY VS. DEFIANCE, 191 U. S., 192, 48 Law Edition 140, this Court said:

> "We have repeatedly held that when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution, or some law or treaty of the United States, before jurisdiction can be maintained on this ground."

Following this general statement of the law this Court held that the assertion in the bill filed by the Water Company against the municipality, that the obligation of the municipality's rental contract with the Company was impaired by an ordinance which denied the validity of the contract was too clearly unfounded to present a case of which the Federal Court had jurisdiction, the ordinance itself showing that it did not in fact constitute such an impairment of the contract.

In the NEWBURYPORT WATER COMPANY vs. CITY OF NEWBURYPORT, 193 U. S., 562, 48 Law Edition, 796, this Court speaking through the present Chief Justice said:

> "At the threshold we are met with the objection raised below and urged at bar, that the circuit court was without jurisdiction, because the bill on its face did not state a case arising under the Constitution or laws of the United States, within the intendment of the act of August 13, 1888, 25 Stat. at L. 44, Chap. 866 (U. S. Comp. Stat, 1901, p. 508). As the case is here on direct appeal from the decree of the Circuit Court of the United States, the solution of this question necessarily involves also deciding whether the case was properly brought to this court. As the existence of the constitutional question is the only basis of the right to the direct appeal, if there was no such question in the court below there was and is no such issue by which the direct appeal to this court can be sustained. Under these circumstances, if the contention as to want of jurisdiction of the court below, arising from the alleged absence of constitutional questions, be well founded, our duty is not simply to dismiss the appeal, but to reverse the decree below, with instructions to the circuit court to dismiss the bill for want of jurisdiction. Defiance Water Co. vs. Defiance 191 U. S., 184, ante. 140, 24 Sup. Ct. Rep., 63.

> "If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. On the contrary, it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial, but is without color or merit."

and following this statement of the law the Court held that an averment in a bill that the property of the Water Company was taken without due process of law by a Massachusetts statute because of the construction put upon such statute by the highest court of the State, was insufficient to sustain the jurisdiction of the Federal Court, where it was shown upon the face of the bill and such statute that the statute did not so operate. In this case, the Water Company having voluntarily accepted the provisions of the statute and conveyed its property thereunder was disappointed by the construction put upon the statute by the Supreme Court of the State and attempted to assail its constitutionality.

To the same effect is the case of McCAIN vs. DES MOINES 174 U. S., 167.

In the case of ENNIS WATERWORKS CO. vs. CITY OF ENNIS, 233 U. S., 651, 58 Law Edition, 1139, Writ of Error was sued out to final judgment of the Supreme Court of Texas. The jurisdiction of the Supreme Court was challenged upon three grounds, the third of which was as follows:

> "That even if it be the duty of this court to determine for itself whether the state court rightly concluded that there was originally, no contract, nevertheless there is no jurisdiction in this case because the court below, in deciding that there was

originally no contract, based its action upon a rule of state law which had been so conclusively determined at the time the alleged ordinance relied on as a contract was adopted, that the assertion that there is a contract right is of so frivolous and unsubstantial a character as to afford no basis for jurisdiction."

Speaking of this the Court says: "The face of the record so clearly manifests the correctness of the third proposition that we pass at once to its consideration." It then held that the law of the State of Texas having been so thoroughly settled to the effect that the contract relied upon was void that no Federal question with regard to its impairment arose and accordingly the Supreme Court was without jurisdiction. Quoting the court: "In other words that where we come to consider a contract arising from a State law or ordinance we will treat it as if there was embodied in their text the settled rule of law which existed in the State at the time the State action relied upon as a contract was taken."

While this case involves a question of the jurisdiction of the Supreme Court upon writ of error still the principal argued is analogous to the one at bar. As we understand these decisions of this Court if the bill upon its face showed there was no substantial controversy arising under the Constitution or laws of the United States the lower court was without jurisdiction. If the bill showed that there was no taking of property without due process of law but that complainant was endeavoring by injunction to avoid a compliance with its own voluntary valid agreements, the Court should take notice of that fact and not entertain jurisdiction of the case, despite the fact that the bill was replete with allegations to the effect that the complainant's constitutional rights had been invaded.

If appellants be correct in their contention in this case the lower court was without jurisdiction and it will be the duty of this Court under the decision in Defiance case and Newburyport case, to reverse the case with instructions to dismiss. The question as to the jurisdiction of the court hinges necessarily upon the existence of the contract and the right to make same and that proposition will be more fully commented on under the succeeding subheads.

II.

IF IT BE HELD THAT THE COURT HAD JURISDICTION STILL IT ERRED IN GRANTING THE WRIT FOR THE REASON THAT THE PETITIONER WAS BOUND BY THE FRANCHISE ORDINANCE OF 1899 AND THE CONSOLIDATION ORDINANCE OF 1917, BOTH OF WHICH CONSTITUTED VALID AND BINDING CONTRACTS.

The District Court in granting the writ of injunction went further in the two written opinions handed down than either the Court of Civil Appeals of the State of Texas, or this Court was willing to go in the Altgelt case.

FIRST: The District Court holds that the franchise ordinance of 1899 and the Consolidation ordinance of 1917 in so far as they apply to rates were not contracts but simply regulations.

SECOND: That if considered as contracts the city was without power to make same.

Let us briefly consider both these propositions:

FIRST: With regard to the Court's statement that the two ordinances accepted as they were by the Public Service Company and its predecessors do not constitute contracts. This Court in the Alegelt case declined to pass on the question of contract pro tanto but contented itself by holding

that even though the ordinance of 1899 be considered as a contract that it was still subject to regulation by the State Legislature. The decided intimation of that opinion, however, if we may be permitted to draw conclusions from the language used, is that the Court considered the franchise ordinance as a contract, but one subject to future regulation and control by the Legislature, for the Court says:

> "Assuming, but not deciding, that the ordinance of March 16, 1899, extending the franchise of the San Antonio Street Railway, and imposing certain limitations, constituted a contract pro tanto, the question still remains whether the provision 'that said street railway companies shall charge 5 cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other,' constituted a contract with respect to which no further legislation upon that subject could be enacted without impairing its obligation. Even if construed as a contract, it was still subject to the provisions of the Constitution of 1876, which in 17 of the Bill of Rights, declared that no irrevocable or uncontrollable grant of special privileges or immunities should be made; but that all privileges granted by the Legislature or created under its authority shall be subject to the control thereof." San Antonio Traction Co. vs. Altgelt, 200 U. S. Supreme Court Reports 494.

The Court further holds in the latter part of the opinion that even the State Legislature could not reduce the rate in such a manner as to make it confiscatory.

The Court of Civil Appeals in the same case declined to hold that the franchise of 1899 was not a contract and based its decision purely upon Section 17, Bill of Rights.

That it should be treated as a contract is plain to our minds when its form and the facts in connection with it are considered.

FIRST: The City is given in Article 1, Section 4, of the Charter in effect at that time, the power "To make all contracts, and to do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate administrative powers."

SECOND: By Section 100 of the Charter it is given power "exclusively to prevent control and regulate everything connected with city railroads and make such rules and regulations for the same as the City Council may deem necessary."

Even the District Court admits that this provision is broad enough to authorize the contract unless restricted by Section 17 of the Bill of Rights, for it says in its opinion: "The power to regulate everything connected with street railroads, thus unrestricted would include authority to contract for and fix rates were it not for the bar imposed by Section 17."

THIRD: Section 7, of Article 10 of the Constitution of the State of Texas, provides:

> "No law shall be passed by the Legislature granting the right to construct and operate a street railroad within any city, town or village, or upon any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad."

FOURTH: The franchise ordinance itself contains a provision for written acceptance by the grantee which written acceptance the records show was filed.

FIFTH: Throughout the entire ordinance constantly occur expressions of this character:

> "Said San Antonio Street Railway Company' shall after their acceptance of the extension hereby granted, pave," etc.

"The said Mutual Electric Light Company agrees to furnish the City of San Antonio and the City agrees to take for five years," etc.

"City reserves the right to renew this contract for ten (10) years after the expiration of this contract."

That the cities of Texas can and do contract with regard to matters of this kind by franchise ordinances is too well settled to admit of controversy.

Mayor et al, vs. Houston Railway, 83 Texas, 548.

Rio Grande Railway vs. Brownsville, 45 Tex., 88.

Athens Telephone Co. vs. City of Athens, 182 S. W., 42.

Texarkana Gas & Electric Co. vs. City of Texarkana, 123 S. W., 213.

City of Terrell vs. Terrell Electric Light Co., 187 S. W., 966.

Galveston & Western Railway Co. vs. Galveston, 90 Tex., 398.

In none of these cases was the franchise agreement construed as a mere regulation but on the contrary same was treated as a vested right, contractual in its nature, subject only to the Legislature as provided for in Section 17 of the Bill of Rights.

The Court will bear in mind that at this stage we are simply discussing the question as to whether the franchise ordinance constituted a contract. The question of the power of the city to make it will be discussed later. The form of the ordinance itself is contractual. Words of agreement are used as shown above, and provision is made for a written acceptance by the grantee, which clearly indicates that there was to be a meeting of the minds, and an agreement on the part of the parties and not a mere regulation. Importance has been attached by this Court to the fact that

a written acceptance of ordinances was required thereby constituting contracts. In the Detroit case, 184 U. S. 366, 46 Law Edition, 592, the Court said:

> "The rate of fare is among the most material and important of the terms and conditions which might be imposed by the city in exchange for its consent to the laying of railroad tracks and the running of cars thereon through its streets. It would be a subject for grave consideration and conference between the parties, and when determined by mutual agreement, the rate would naturally be regarded as fixed until another rate was adopted by a like agreement."
>
> "Ordinances of a like nature were passed by the common council relating to the other companies, and all of them were accepted in writing. * * * Coming to a consideration of the effect of the language used we think it amounted to a contract as to rates of fare."

and in the CLEVELAND case, 194 U. S. 534, 48 Law Edition, 1108, the Court says:

> "The acceptance of this ordinance by the railroad companies affected thereby was required to be in writing, and filed with the city."
>
> "In reason, the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fares were fixed in ordinances for a stated time and no reservation was made of a right to alter; that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, *and the fact that a written acceptance by the corporations of the ordinances was required*, we can see no escape from the conclusion

that the ordinances were intended to be agreements binding upon both parties, definitely fixing the rates of fare which might be thereafter charged."

In view of these authorities and these facts it is difficult to understand why the Court should hold that this franchise provision was intended simply as a regulation. The reports of Texas as shown by the authorities cited above are replete with instances in which the Courts of last resort have held that franchise agreements of this character constitute contracts and are entitled to protection as such. The District Court in his memorandum opinion says that the ordinance speaks in words of command but not of contract and bases this upon what he says is the decision of this Court in the LOS ANGELES case, 211 U. S., referring to an ordinance of like terms and effect. In that statement the District Court is in error as this court in Los Angeles case was not speaking at that time of the ordinance but was speaking of the City Charter as the text of the case will plainly show. We most earnestly submit to the Court that the franchise ordinance of 1899 was contractual in its nature and constituted a contract under the decision of this Court and the Courts of the State of Texas.

Now to consider the second proposition that admitting the franchise agreement to be a contract the city was without authority to make it. We are not at this juncture discussing the effect of the passage of the Home Rule Amendment and the adoption by the City of San Antonio of its charter thereunder, but confine this argument for the time being to the effect of the 1899 franchise.

The Company itself was under no disability in the premises and no contention of that kind is made. The City of San Antonio in 1899 had as shown before in this argument: "Power under its charter to contract; exclusively to prevent control and regulate everything connected with the

city railroads, etc.; to direct and control the laying and construction of railroad tracks within the city, and to pass all ordinances necessary for the order of good government of the city or the trade, commerce or health thereof." Section 7 of Article 10 of the State Constitution provides that even the Legislature could not grant the right to construct and operate a street railway within any city without first acquiring the consent of local authorities. As above stated the District Court conceded that the authority of Section 100 of the Charter was sufficient to enable the city to make this contract unless limited. He bases his decision that the city was without power to make the contract solely and entirely on Section 17 of the Bill of Rights of the State of Texas, for he says; "The city in the present case fails to show that it had legislative authority to make the contract it alleges was made with the company because the inhibition of the Constitution of 1876 against irrevocable or uncontrollable grants of special privileges or immunities stands squarely in the way."

The most that can be said of this provision is that any grant made by the Legislature or under its authority of the character there mentioned shall be subject to its control. The parties contracting were charged with notice of the fact that the contract was subject to the future regulation and control by the Legislature (not the city) but subject to that limitation they were at liberty to contract as they saw fit. This was the construction put on the article by the Court of Civil Appeals in the Altgelt case, it was the construction put upon it by this Court in that case, and this Court went out of its way to remark that even the Legislature could not so regulate and control the matter as to confiscate the property of the parties. It was the construction placed upon this article of the constitution by the Supreme Court of Texas in the HOUSTON RAILWAY case, 83 Texas, 548.

It is obvious from the decisions cited that it was not the intention of the framers of the Constitution to take from cities the right to contract with regard to these matters. The most that can be contended for it is that the contracts were subject to be regulated and controlled by the Legislature. If this were not true why have the various Courts of Texas enforced these franchise provisions in the numbers of cases which we have cited to this Court?

In the HOUSTON case, 83 Texas, an injunction was brought by the Houston Street Railway Company to enjoin the city from interfering with it in laying a street railway track. The city defended upon the ground that it had no authority from the Legislature to grant the franchise. The franchise itself gave to the Company the right to go upon the streets and provided that its use of the streets after the passage of the ordinance should be deemed as an acceptance of the grant. The Charter from the State to the Company gave it the right to enter into contracts with the City of Houston, and the Charter of the City of Houston contained the following provision:

> "The City Council shall have the exclusive control and regulation of all streets, alleys, public grounds, and highways within the corporate limits of the city, and to direct and control the laying and construction of railway tracks, turnouts and switches, and to require that they be constructed and laid so as to interfere as little as possible with the ordinary travel and use of the streets. To control and regulate everything concerning street railways," etc.

In discussing the matter the Supreme Court of Texas, said:

> "We are of the opinion that by the terms of both of these charters (clearly by that of the street railway company) the Legislature intended to and did

confer ample authority upon the city council to grant the franchise in question to the plaintiff. We also think, that according to the current of the authorities, the grant having been duly accepted and acted upon by appellee, became a vested right or perfect contract which could not be subsequently repealed nor impaired by the common council or the authorities of the City of Houston; provided, however, that there is no constitutional prohibition to the granting of said special privileges by the Legislature or under its authority. Railway vs. City of Brownsville, 45 Texas, 96, 2 Dill. on Mun. Corp. 3 ed., Sec. 727; 1 Ld., Sec. 314; Port of Mobile vs. Railway, 3 South Rep., 108; Railway cases, 79 Ala., 469; Milhan vs. Sharp, 27 N. Y., 611; City of Burlington vs. Street Railway, 49 Iowa, 144; Dartmouth College Case, 4 Wheat, 519; Fletcher vs. Peck, 6 Cranch, 137; Stein vs. Mayor, 49 Ala., 362; Railway vs. Anderson County, 59 Texas, 667; Const. Art. 10, Sec. 7. Those decisions, cited by counsel for the appellant, which deny the power of the city government, under its general authority over its streets, to grant the right to operate a street railway in such streets for private gain, were rendered in cases where the Legislature had not conferred upon the municipality the necessary authority to extend such franchise."

The Court then goes on and of its own motion discusses the bearing that Section 17 of the Bill of Rights might have upon this case, and in the course of the discussion it says:

"Second: But the word 'irrevocable' is frequently used in a somewhat different sense. It may mean a thing or denote a right or power which can not be annulled or vacated except for a sufficient cause. It may mean unalterable or irreversible. To revoke sometimes denotes the right to annul, rescind, or abolish. Webster. Revocation not only means the recalling of the power, but may denote "the vacating" of the grant for cause." Bouvier.

"It may be that this is the sense in which the language of the paragraph before quoted is used. The framers of the Constitution may have intended merely to prohibit the Legislature from granting any "special privilege" which could not be annulled, condemned, or vacated in the manner and for the causes as might be prescribed by law. This view of the question is strengthened by the use of the word 'uncontrollable in the same connection, and the same clause most positively declares that all 'privileges and franchises shall be subject to legislative control' and regulation. When we consider the effect and consequences of declaring that every grant of special privileges or franchises for a term of years by the State could be revoked or withdrawn at the mere pleasure or will of the Legislature, we then very much doubt that the framers of the Constitution or the people in adopting it intended to reserve to or confer such power or authority upon the Legislature. The policy of the State seems to have been to encourage the building of railways and the investment of capital in similar enterprises."

"If these special privileges or franchises in question can be recalled or terminated at the will of the Legislature, then it would follow that under the same reservation in the organic law, every charter granted since the adoption of the present Constitution to any railway, telegraph or telephone company, ice factory, gas or electric light company, etc., could be repealed or revoked at the pleasure of the Legislature, without the necessity of a judicial forfeiture. If the language of the Constitution admitted of no other construction, it would of course be the imperative duty of the courts to so interpret it, regardless of consequences. If any injustice results, 'the remedy for such injustice must be found in the action of the people themselves, through an amendment of their work when better counsels prevail.' (Cool. Const. Lim. 88). Where the construction would lead to 'monstrous and absurd conse-

quences' the same learned author concedes the right and duty of the courts to 'question and cross question closely' the clause, to discover if it will not admit of another construction more in harmony 'with the general purposes of such instruments.' And here we invoke Section 19 of the Bill of Rights, which not only protects property but also 'privileges or immunities from destruction,' except by due course of the law of the land.' While not conclusive of the question, still this provision affords some evidence of the general purpose of the Constitution, and that its authors did not intend by the declaration contained in Section 17 to announce that the continuance or duration of every privilege or immunity which might be 'created by the Legislature or under its authority,' should be entirely dependent upon its caprice or will. See also Sec. 22, Art. 4."

"With the light before us at this time, we think that the better opinion is that this particular clause of the Constitution was intended to prohibit the Legislature from granting any 'special privilege or immunity' in such way or of such character as that it could not be subsequently annulled or declared forfeited for such causes as might be defined by law or condemned in the exercise of eminent domain (Cool. Const. Lim., Secs. 341-344); and it was further intended that 'all privileges and franchises' granted by the Legislature or under its authority should at all times remain subject to legislative control and regulation."

This opinion while having been followed many times, has never been limited or reversed so far as we are able to find.

If this be true, how can it be contended that this Article of the Bill of Rights constitute an absolute bar against the making of these contracts? In order to obtain such a result the Court must read into the Article something which does

not there exist. There is nothing there which would have prevented the city and this company from contracting and there is nothing there which would have prevented both the city and the company from being bound by the contract. The Legislature unquestionably under the decision in the Altgelt case and under the decision in this Houston case had the right to regulate and control the grant but that control did not extend to confiscation. The Complainant in this case *might now very well have good cause to enjoin the One Half Fare Law of the State as confiscatory, but it has no ground upon which to evade its own voluntary contract.*

When it entered into the contract it did so charged with notice of the fact as held by this Court that the Legislature might regulate it and control it. So long as the legislative control did not constitute a taking of its property without due process it had no grounds for complaint. When its expenses were such and its revenues were such that the reduction in its returns caused by the One-Half Fare Law constituted a taking of its property, it had just grounds to complain of that law, but it had no grounds upon which to refuse to comply with its own voluntary contract entered into with the city.

The decisions of the Courts of Texas will show that the policy of this State has been to uphold these franchise contracts. In one of the earliest cases that of the RIO GRANDE RAILWAY vs. CITY OF BROWNSVILLE, 45 Texas, 96, the Supreme Court says:

> "But in addition to this defect in the bill, it plainly appears from the statement of facts that appellee had consented to the use of its streets by appellant. This was not denied. The grounds upon which appellee relies is not that it had not given its assent to the use of its streets by appellant, but that it had subsequently withdrawn and revoked such

consent. There is nothing in the statute authorizing the authorities of the cities and towns, after agreeing with railway companies as to the point or points at which the latter may construct their roads, to withdraw from or annul such agreement at their option. That they have agreed to let the company make its own selection would not seem to alter the case. If they may revoke such consent, which however, we are not called upon to decide in this case, it should appear it was done, and notice of it given the company before any action was had or expenditure was made on the faith of the consent or agreement. But nothing of the kind is alleged in the petition, or has been shown by the evidence. On the contrary, the inference to be drawn from the bill itself, is, that appellant must have designated and surveyed its line, and had, probably, commenced work within the city limits before the repeal of the ordinance authorizing it to make its road on any street it might select, as shown by the statement of facts. If so, the repeal of the ordinance granting appellant the privilege of selecting and appropriating any of the streets and alleys of the city it chose, was clearly inoperative and void."

In GALVESTON AND WESTERN RAILWAY, TEXAS, vs. GALVESTON, 90 Texas, 407, the Supreme Court of Texas after analyzing a number of cases says:

"The result of the cases reviewed, if their correctness be conceded, is to establish the following propositions of law:

"(1) If the right of a railroad to occupy the street of a town or city be dependent solely upon the action of such town or city, the latter may, in granting its consent, prescribe terms for the breach of which the right granted may be forfeited. (State vs. Madison Street Railway, 72 Wis. 612). The power that creates a corporate right may limit its enjoyment.

"(2) When the law of the State grants permission to railroads to use the streets of towns and cities, but requires the assent of the authorities of such municipal corporation, if the town or city in giving such concent annexes thereto conditions which may operate upon breach thereof to forfeit the license granted, and if such terms are embodied in a separate contract signed by the railroad company, it will be enforced by the courts. Railway vs. Leavenworth, 1 Dillon C. C., 393; Indianola vs. Railway, cited above."

This Court will bear in mind in this case Section 7, Article 10 of the Constitution of the State of Texas, which provides that no street railway may be built upon the streets of a city without first acquiring the consent of the local authorities.

In the Indianola case, 56 Texas, 594, a Railway Company in consideration of permission given it to go over the streets of the town entered into a contract and gave bond. Later, on being sued it raised the question as to its and the city's power to make the contract. The Supreme Court of Texas, in holding them liable, said:

"It does not follow from the fact that the company might occupy with its road some of the streets and alleys of the city without compensation, that the city could not refuse to allow the use of such of its streets as would be injurious to its commerce and inconvenient to its citizens. The city authorities control the streets for the benefit and convenience of the citizens, and have no power to sell and convey the same; yet there is no principle of law that would preclude them from consenting to an easement therein, for a railroad company to use the same for a road-bed. And the use in this way of some of the streets of the city might be detrimental to its commerce and inconvenient to the citizens; hence we see no reason why these authorities might

not contract for a compensation inuring alike to all of its citizens, for submitting to such injuries and disadvantages. Surely after the company has received and is in the enjoyment of the fruits arising from such a contract, it will not be heard to complain, and assert that the city could not confer upon it the right that it had thus received and is now enjoying."

"We conclude that the consideration paid and furnished by the City of Indianola for the contract sued on is not illegal, and that the city authorities had power over the subject matter of the contract."

And in closing its opinion the Court further says:

"In the case of Dakin vs. Williams, 19 Wend, 447, Chief Justice Nelson said: "From a critical examination of all these cases, and others that might be referred to, it will be found that the business of the court in construing this clause of the agreement, as in respect to every other clause thereof, is to inquire after the meaning and intent of the parties; and when that is clearly ascertained from the terms and language used, it must be carried into effect," etc.

"Men may enter into improvident contracts when the advantage is knowingly and strikingly against them; they may also expend their property upon idle or worthless objects, or give it away, if they please, without any equivalent, in spite of the powers or interference of the court; and it is difficult to see why they may not fix for themselves by agreement in advance a measure of compensation, however extravagant it may be, for a violation of their covenant, without the intervention of a court or jury. Can it be an exception to their power to bind themselves by lawful contract? We suppose not," etc.

"If it be said that the measure is a hard one it may be replied that the defendants should not have stipulated for it, or having been thus indiscreet

> they should have sought the only exemption which was still within their power, namely, the faithful fulfillment of their agreement."

THE CASE OF TEXARKANA GAS AND ELECTRIC CO. vs. CITY OF TEXARKANA, 123 S. W., 212, is in point. The City of Texarkana passed an ordinance levying a fifty-cent (50c) license tax on telephone and electric light poles, etc. The Gas and Electric Company resisted on the grounds that they had a franchise agreement ante-dating the ordinance in which they agreed to perform certain services for the city and in which no mention was made of this license tax. The city attempted to justify on the police power, and contended that the governmental right to regulate and license could not be contracted or bargained away. The lower court gave judgment for the city. The Court of Civil Appeals reversed and rendered the case and in so doing held:

> "It must be conceded that the provisions of this ordinance, including the levy of the license fee, fall within the usual police powers of a municipal corporation having the right to regulate and control the use and occupancy of its highways by persons engaged in conducting public utilities, such as that of the appellant, for private gain. But it does not follow from this that the exercise of some part of this police power may not under certain conditions be resisted upon the ground that it is an attempt to violate a vested right. The state, as the trustee for its citizens, is the ultimate holder and owner of a paramount authority to govern and regulate the use and occupancy of the public highways of the country. Municipal corporations succeed to this authority by virtue of the grants contained in their charters. (3 Abbott, Municipal Corp. 913). When thus empowered, cities have the authority to grant to private parties the privilege of permanently occupying and using certain portions of their high-

ways for the purpose of carrying on a business or enterprise furnishing some public service. In granting the right, or franchise as it is called, the city can impose conditions or charge a fee for the privilege given, which the applicant can accept or reject at his pleasure; but, having accepted it, he takes the franchise subject to the conditions imposed, and must pay the consideration exacted. (3 Abbott, Municipal Corp., 908). For without the consent of the municipality no one has any right to permanently use or occupy any portion of the public highways to the exclusion of others. The privilege is granted presumptively for the benefit of the public in securing the use of some agency of general utility; and when a consideration is received in return, it inures to the benefit of the community by going into the public treasury. It can therefore be readily seen that such transactions have many of the elements of a contract. The concession cannot be regarded otherwise than as a valuable property right the revocation of which after acceptance might entail serious damage."

"If the original franchise relied upon in this case was one which the City of Texarkana had the authority in the first instance to grant, one which public policy did not prohibit, it was a concession entitled to the protection generally accorded to vested rights secured by contracts. New York, Lake Erie & Western R. R. Co. vs. Commonwealth of Pennsylvania, 153 U. S. 628, 14 Sup. Ct., 952, 38 L. Ed. 846; City of St. L. vs. W. U. Tel. Co., 148 U. S. 93, 13 Sup. Ct. 485, 37 L. Ed., 380; Louisville Trust Co. vs. City of Cin., 76 Fed., 296, 22 C. A., 334, 3 Abbott, Municipal Corp., 297; Mayor vs. Houston Ry. Co., 83 Tex., 555, 19 S. W., 127, 49 Am. St. Rep., 679; Jumbo Cattle Co. vs. Bacon 79 Tex., 12, 14 S. W., 840, City of Detroit vs. Detroit R. Co., 184 U. S., 378, 22 Sup. Ct., 410, 46 L. Ed., 607; City Ry. Co. vs. Citizens' St. Ry. Co., 166 U. S.,

558, 17 Sup. Ct., 653, 41 L. Ed., 1114; 2 Abbott, Municipal Corp, 896, 919, and cases cited."

The Court continuing holds that to refuse to protect the franchise rights would amount to practical confiscation, that the relation was contractual and the right vested

> "To permit the exercise of such authority would sanction the enactment of a measure violative of contractual obligations."

We deem it unnecessary at this time to discuss the various other Texas cases cited but will refer to them under a later proposition. The ATHENS case, 182 S. W., 42, is particularly pertinent.

Appellants therefore assert:

FIRST: That the franchise ordinance of 1899 constituted a contract, and

SECOND: That the City had the authority to make same. If these premises be correct then the rule laid down by this Court in the Columbus case and the other cases here now cited, applies.

Columbus Railway etc. vs. Columbus, 249 U. S., 398; 63 Law, Ed., 669.

Knoxville Water Co., vs. Knoxville, 189 U. S., 437.

Cleveland vs. Cleveland City R. Co., 194 U. S., 517; 48 Law, Ed., 1102.

Home Co. vs. Los Angeles, 211 U. S., 274; 53 Law Ed., 176.

Vicksburg vs. Vicksburg Waterworks Co., 206 U. S., 496; 51 Law Ed., 1155.

Detroit vs. Detroit St. Ry., 184 U. S., 368; 46 Law Ed., 592.

Potter vs. Calumet et al, 158 Fed., 521.

Gas & Electric Co., et al, vs. Manhattan et al, 253 Fed., 453.

Moorhead vs. Union Light Co., 255 Fed., 920.
Michigan Ry. Co. vs. Lansing, 260 Fed., 322.
Rochester vs. Ross, 109 N. Y., Supp., 381.
Public Service Co. vs. Westchester, 99 N. E., 536, 206 N. Y., 209.
People vs. Suburban Ry. Co., 178 Ill., 594, 49 L. R. A., 650.

III.

SHOULD IT BE HELD THAT THE CITY WAS WITHOUT AUTHORITY TO MAKE THE FRANCHISE CONTRACT OF 1899 FOR A FIVE CENT (5c) FARE, STILL THE CITY WAS UNDER NO SUCH DISABILITY in 1917 WHEN THE CONSOLIDATION ORDINANCE WAS GRANTED BECAUSE OF THE FACT THAT IT HAD BECOME A HOME RULE CITY UNDER THE AMENDMENT PASSED IN 1912 TO THE CONSTITUTION OF THE STATE OF TEXAS.

Should this Court hold as the District Court did that Section 17 of the Bill of Rights constituted a bar to the making of the contract attempted to be made in 1899, appellants submit that this disability was removed by the passage of the Home Rule Amendment to the Constitution of the State of exas, in 1912. Article 11 of the Constitution of Texas was amended by passage of Section 5, among others which reads in part as follows:

> "Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the constitution of the

State, or of the general laws enacted by the Legislature of this State."

After the passage of this amendment the Legislature of the State of Texas passed what is known as the Enabling Act, conferring upon cities adopting their charters or amendments thereunder the full power of local self government, Revised Statutes, Art. 1096 D. The record shows that the City of San Antonio, in 1914 amended its charter under the terms thereof. The City of San Antonio accordingly after 1914 became what is known in Texas, as a Home Rule City and derives its powers and authorities not from the Legislature but from the sovereign people. That this is the view taken by the Courts of Texas is shown by the decision in XYDIAS AMUSEMENT CO. vs. CITY OF HOUSTON, 185 S. W., 415, in which the Court says in discussing an ordinance of the City of Houston, also a Home Rule City:

> "Since the adoption of Section 5, Art. 11, of the Constitution, supra, by the sovereign people of this State in November, 1912, the city council does not derive its power to enact such ordinances as it deems necessary to prevent immoral exhibitions within its corporate limits from the Legislature, but it derives such power directly from the sovereign people, and the only limitations placed on such power by said section is that said council shall not pass any ordinance inconsistent with the Constitution and general laws enacted by the Legislature of this State. Since the adoption of said constitutional section, there is no longer a necessity for the Legislature to confer power upon such city councils, but it may limit its powers only. In other words, the Legislature no longer delegates legislative power to such city councils."

See also STATE vs. VINCENT, 217 S. W., 402.

This being the case the Home Rule cities of Texas are not restricted by Art. 17 of the Bill of Rights for the reason that that Article upon its face applies only to the Legislature and those acting under its authority. The Home Rule cities deriving their authority not from the Legislature but from the sovereign people are accordingly not limited by the inhibition contained in that Section of the Bill of Rights, and would be at liberty to contract without regard to it.

Accordingly we find the City of San Antonio in that position when in 1917 the plaintiffs' predecessors, San Antonio Traction Company, and San Antonio Gas & Electric Company, petitioned the City of San Antonio for the right to consolidate their franchises acquired in 1899 by transferring same to the San Antonio Public Service Company. This transfer they could not make under the city charter without the consent of the city. The city granted the petition upon the condition, however, "That all the limitations, duties, contracts, forfeitures and obligations *imposed on or required of* either of said Companies *at this time*, shall be imposed on and required of the San Antonio Public Service Company." It further required a written acceptance of the ordinance, which written acceptance was filed (R-22-23-24).

The Court will note the verbiage *"Imposed on or required of at this time."*

At that time, to-wit, 1917, the San Antonio Traction Company was complying with the Franchise ordinance of 1899, by charging five cents (5c) fare with universal transfer. A city ordinance, penal in its character, was in effect making a similar requirement upon the company. The State Half-Fare Law was in effect and was being complied with by the Company. Despite the fact that this application was made and these privileges granted at the time the Company in its petition now claims it was commencing

to lose money, it raised no objection to any of these requirements or obligations and no question was raised or complaint made with regard to the rate of fare (121). This being the case appellants now most earnestly insist that the Company recontracted and rebound itself to and with the city by applying for and accepting the consolidation ordinance. Should it be conceded that the Court was right in holding that the city was without authority to make the contract of 1899, (and this is practically the sole ground upon which he based his decision), that objection most certainly could not obtain when the Company rebound itself in 1917.

IV.

THE FARE PROVISIONS IN THE ORDINANCE IN QUESTION CONSTITUTED AT THE LEAST A CONDITION OR LIMITATION ANNEXED TO THE GRANT WHICH COMPLAINANT HAVING VOLUNTARILY ACCEPTED IS ESTOPPED TO CONTEST.

This Court in the Altgelt case referred to the ordinance as "imposing certain limitations upon the exercise of their franchises, among which was that certain street railway companies shall charge five cents (5c) for one continuous ride," etc. The Court of Civil Appeals in the same case held that the ordinance of 1899 "imposed certain conditions and limitations upon the exercise of the rights of the companies, among which was that said street railway companies shall charge five cents (5c) fare for one continuous ride," etc.

The rate fixed by the ordinance was one of the conditions upon which the granting of the franchise was made. It was fixed in the interest of the inhabitants of the municipality and as a safe guard against an excessive rate which might be fixed by the Company. Rates so fixed could not

be raised by the Company without the consent of the city. It must be assumed that the ordinance would not have been passed by the city in the absence of this clause and it is equally clear that the Company regarded itself fully compensated for the burdens assumed by the granting of the privileges it secured through the ordinance.

The Courts of Texas have in a number of cases considered this matter of the annexing of conditions and limitations to franchise grants and have upheld same even in instances where it was held that the city was without authority to enter into such an agreement as an original proposition.

In the case of the City of TERRELL VS. TERRELL ELECTRIC LIGHT CO., 187 S. W., 966, the City of Terrell by ordinance granted to the Electric Light Company the right to use its streets for electric light purposes under certain conditions and the Company agreed to perform certain services for the city. The ordinance provided that it was to be agreed to by the company and this agreement was made. The Company later made arrangements to purchase its power from another company, and the city disapproving of this brought suit, attempting in substance to forfeit the franchise and terminate the company's right in the premises. The District Court decided against the city and the Court of Civil Appeals in passing on the case says:

> "The appellee Terrell Electric Light Company, as we have shown, is authorized by its charter to supply electric light, etc., to its customers by any means, which clearly would include the right to purchase current from another and distribute and sell same to its customers as proposed by the contract with Texas Power & Light Company. And while the Legislature has committed to incorporate towns and cities 'exclusive control and power over' its streets, alleys, etc. (Article 854, Vernon Sayles' Civ.

State.), and while, as a consequence the Terrell Electric Light Company, could not enter upon the streets of appellant without its consent reasonably exercised, such consent may not limit or restrict the corporate authority conferred by the State. For, the paramount right to regulate public highways being primarily in the Legislature, municipalities may not, under the grant of exclusive control, of its streets, legislative on everything connected with the subject over which they possess limited authority, such as the manner and means of conducting the business so permitted the use of the streets. Galveston & Western Ry. Co. vs. City of Galveston, 90 Tex., 398; 39 S. W., 97; 36 L. R. A., 33. *However, a limitation of the general rule stated is that if the municipality annexes to a grant to enter upon its streets a condition, although without authority to do so, and the grantee voluntarily accepts the grant with the annexed condition, it cannot afterwards refuse to be bound thereby or be heard to deny the authority to impose same. Athens Tel. Co. vs. City of Athens, 182 S. W., 42.* The rule stated was adhered to in the case cited, and was a controlling issue. Writ of error was denied by the Supreme Court."

Following this statement of the law the Court held that there was no provision of the ordinance forbidding the purchase of power by the company and that the city was bound by the franchise agreement. Decision by the District Court was affirmed.

The Athens Telephone case referred to in this opinion is one of the leading cases of the State, the writ of error having been refused by the Supreme Court. The question as to a franchise provision for rates was involved which makes the case particularly appropriate in this connection. The Athens Telephone Company was at the instance of the City of Athens enjoined by the District Court from col-

lecting a rate in excess of One Dollar and Fifty Cents ($1.50) per month for telephones. The record showed that the Company or its predecessors had sought and accepted a franchise for fifty years (50) providing for a One Dollar and Fifty cents ($1.50) rate and later it attempted to raise this rate to Two Dollars and Fifty Cents ($2.50). In passing upon the case the Court of Civil Appeals said:

> "The trial court found, and it is not denied, that Garret & Truett voluntarily agreed that the rate fixed by their agreement with the citizens of Athens should be embodied in the grant by appellees, after its incorporation under the general laws of the State. An accepted authority asserts the general rule to be that the right to fix rates for the transmission of telegraph and telephone messages is inherently in the Legislature, but that such authority may be delegated to state boards, etc., or municipalities, though it will not be recognized as reposing in the latter bodies, unless very clearly delegated, yet that—*"A municipality may * * * in granting rights and privileges to such a company, annex thereto a condition as to the rates to be charged and although the municipality may not have the power to impose such a condition upon the company against its consent, yet if the company voluntarily accepts the rights granted with the conditions annexed, it cannot afterwards contest the reasonableness of such rate, or refuse to furnish services or facilities at the rate stipulated, or deny the authority of the municipality to make such agreement.* 37 Cyc. 1630."
>
> "Many cases from many jurisdictions are cited in support of the rule so clearly announced. 182 S. W., 43.
>
> "But it is further urged, in connection with what we have just said and notwithstanding the rule cited, Garrett & Truett were not bound by the grant fixing the rate of rentals, because the agreement was not evidenced by independent or collateral agreement in that respect. This contention is based

upon the rule announced in Galveston & Western Ry. Co. vs. Galveston, 90 Texas, 398; 39 S. W., 96; 36 L. R. A., 33. In that case it was, in effect, among other things, said that, when by the law of the state a given business was permitted to use the streets of towns and cities there could not lawfully be annexed to such right by the municipalities conditions which might, upon breach, operate to forfeit the grant, unless evidenced by separate or independent contract signed by the railway, and we presume, upon consideration other than the mere right to go upon the streets as provided by law. The difference between the case cited and the one at bar is that the Galveston & Western Ry. had the right by state law, as have distance telephone companies, to go upon the streets of the city of Galveston, while local telephone companies, such as appellant, do not possess that absolute right. It may be said in passing that it was held in the same case that 'if the right of a railroad' and by analogy a local telephone business, 'to occupy the streets of a town or city by dependent solely upon the action of such town or city,' the latter may in granting its consent, prescribe terms for the breach of which the right granted may be forfeited."

This Court will therefore see the interpretation placed by the courts of last resort in Texas upon franchise agreements of this character. As said, a writ of error was denied by the Supreme Court of Texas in the case, and we call this Court's attention to the fact that this case had been decided and the writ denied when petitioner, San Antonio Public Service Company applied for, and accepted the consolidation ordinance of 1917. To the same effect is the decision of the Court of Civil Appeals in the case of Texarkana Gas and Electric Company vs. City of Texarkana which has been more fully discussed heretofore.

Many other authorities along this line might be multiplied from courts of good authority. In the ROCHESTER TELEPHONE CO. vs. ROSS, 109 N. Y. Sup., 381, the Court says:

> "Here the telephone company voluntarily entered into a contract with the city; it recognized privileges which it now uses and enjoys; and I think it is now estopped from questioning the right of the city to grant the same and repudiating that part of its agreement limiting its telephone rates, as it provided in the contract. Simons' Sons Company vs. Maryland Telephone & Telegraph Company, 99 Md., 141; 57 Atl., 193; 63 L. R. A., 727; Gaedeke vs. Staten Island Midland Railroad Company, 43 App. Div. 514; 60 N. Y. Sup., 598; Dusenbury vs. New York & C. Traction Company, 46 App. Div., 267, 272; 61 N. Y. Sup., 420."

To the same effect is the decision in Potter vs. Calumet et al, 158 Fed., 520.

In the light of this authority both from the State of Texas and out of it, it is difficult for appellant to see how appellee can be heard to attack the authority of the City of San Antonio to annex those conditions and limitations to its grant. Having asked for and accepted the grant, charged at the time with notice of the fact that it was subject to control and regulation in the future by the Legislature of the State, it is now estopped to say that the City with whom it contracted did not have the authority to make these requirements of it; having for some eighteen (18) years enjoyed the fruits of its bargain it is not entitled because of the fact that the lean years have come upon it, to repudiate same.

V.

THAT THE COURT SHOULD HAVE CONFIRMED THE MASTER'S REPORT AND DISMISSED THE BILL UPON THE GROUNDS THERE SET OUT.

The Master found that the parties agreed that the rate was reasonable as fixed and that such was in fact the case. That the Company's loss was due to the war, increased prices, increased cost of labor and jitney competition. That these were conditions for which the city was not responsible and that for the Court to enjoin the ordinance complained of amounted to a guarantee upon the part of the Court to the Complainant of a fair return regardless of whether the conditions warranted or not. By the ordinance of 1899, accepted by the Company's assignor under whom plaintiff deraigns its right to enjoy its franchise in the City of San Antonio and whose property and plant plaintiff is now using, the rate of fare now complained of by plaintiff was fixed at five cents. This rate was acquiesced in by both parties until the Legislature of this State provided for half rates for school children with the corresponding right of transfer. This regulation though increasing the burden imposed upon the Company, was acquiesced in by the Company without complaint until the year 1917. During the latter year plaintiff represented to the City Council of the City of San Antonio that its interest required and it desired the consolidation of the San Antonio Traction Company and the San Antonio Gas & Electric Company, and that the said Companies should be authorized for such consolidation to assign to plaintiff all their rights, privileges and franchises of any and every nature. The City listened to the prayer of the Company and granted the authority as prayed for, but by granting ordinance it imposed upon the grantee the duty to abide by all the limitations, duties, contracts, forfeitures and ob-

ligations imposed on or required of both said Companies. Among other limitations, duties and obligations, if not contracts, thus imposed on plaintiff was the obligation to adhere to and abide by the rates for transporting passengers then fixed by the City, as well as all other regulations to which either of the pre-existing Companies were subject. This ordinance was accepted by the new company without reservation or limitation.

At the time of the acceptance by the Company of the ordinance of 1917, adopted upon its own prayer, the Great War had been in progress for three years. There had been a radical change, at the time, in the prices of both labor and material. The conditions under which the arrangement between the parties was to be carried out, were, and had been for nearly three years past abnormal. The arrangement, therefore, entered into and approved by both parties in 1917, must be presumed to have been made, not only with reference to existing conditions, but, also, worse conditions probably to ensue in the near future. For this new recognition upon the part of the Company of its obligations to protect the public in the rate of fare and regulation then existing, the City bestowed upon the plaintiff rights which it did not before possess and which it could not exercise without the consent of the municipality. These rights plaintiff is actively asserting in this case, but considers itself free to repudiate the consideration upon which these rights must rest, i. e., its agreement to uphold the rate of fare and regulations existing at the time the rights in question were granted to it.

Less than one year after the grant of these rights plaintiff asked the City for increase in rates, and, in effect, to be relieved from the performance of the conditions expressly assumed by it less than one year previous. In demanding this change in its contractual status plaintiff omitted to offer to restore the City to its original position.

It omitted to offer to dissolve the consolidation of the constituent companies and to reconvey to them the right and franchises derived by it from them under their assignment, and, in a word, to put the parties back in the position they occupied when the consolidation ordinance was passed. Plaintiff seeks to retain all the benefits of the consolidation ordinance and to add to them new and different benefits not, presumtively at least, at that time in the contemplation of the parties.

It will be found in most, if not all, of the adjudicated cases on this point that public utility companies have been allowed successfully to complain of laws or ordinances *decreasing* rates of fare and not of laws or ordinances merely maintaining rates and regulations long in use and acquiesced in, without complaint, by both parties for long periods of time. We believe that no case can be found in which a municipality and public utility company, each acting freely and voluntarily, have agreed upon a rate of fare regulations as reasonable and binding upon both parties and in which the courts have set aside such agreement and abolished the rates and regulations agreed upon within the short period apparent in this case, or any like period. The plainest principles of equity required that the company should not be permitted to complain of any failure to realize profits which it might easily have anticipated and which it must be presumed to have anticipated under existing circumstances, and it should be held to an adherence to the arrangement agreed upon, even at a loss, pending the restoration of normal conditions and the general revival of industry and commerce. It seems to us that the Company is plainly estopped from asserting that if the rate agreed upon by it in 1917, for valuable consideration, was unreasonable the following year or the year next thereafter and that if it is impracticable to "unscramble its eggs" it should clearly show to the Court the fact of

such impracticability. The record affords us no reason for believing that it is impracticable for plaintiff to do equity by restoring or offering to restore the defendant, City, to its original condition.

By the ordinance of 1899, the franchises of the Gas & Electric Company and San Antonio Traction Company were extended for a period of forty years. Plaintiff became the owner of the franchises thus extended in 1917, and its right to enjoy and exericse the franchise was expressly granted to it by the City in the same year. No attempt has been made by the plaintiff to estimate the probable profits of its undertaking for the remainder of its franchise. The record before us apprizes us, however, that during its past existence of its predecessors the investment has been far from unprofitable. The Company has grown from small and inconsiderable beginnings to its present impressive magnitude and its value, appraised in 1900 at something near $700,000 has risen, according to plaintiff's present contention, to over $6,000,000. The installation formerly carried in unequal fragments by four separate, distinct and independent companies has been merged into and is now owned and controlled by one company with all the inevitable and incidental savings in overhead and other charges. Its trackage confined, originally, to different sections of the City, disconnected and controlled by competing and, probably, hostile interests, forms now a harmonious whole traversing all sections of the city, without competitors, and dominated by one governing body. It has no complaint to make of the treatment it has received from the people of the City and from the City Government except the refusal of the City authorities to grant its later request. On the contrary, it may safely be asserted that the Company and its predecessors have received and enjoyed the co-operation and support of the City and its people in all of its efforts to enlarge, perfect

and render profitable its undertaking. We have the right to presume that it will receive the same just and considerate treatment in the future. We have, also, the right to presume that both in 1899 and 1917, both City and Company were looking to the contractual arrangement as a whole and that as in ordinary business enterprises, they anticipated that there would be years or periods of loss, as well as periods of profit, that there would be lean years as well as fat years, and that the Companies must expect to recoup the losses of the lean years from the gains of the fat years. The parties must have contemplated, in other words, not that the Company should reap a reasonable return upon its investment each year of its corporate life, but that the investment, on the whole, should show such reasonable return upon the amount of the investment.

No single fact is more true than that the utility company has no right to an emergency rate that will maintain its normal rate of income. Re Empire Gas & E. Co. (Mass.) P. U. R. 19, 18 D., 912; Re Long Island Railway Co., S. P. S. C. (1st Dist. N. Y.) 294 P. U. R., 1918, A. 649, 654."

Public utility companies, like other corporations and individuals, must to some extent "take the lean years with the fat" and bear some loss of income in war time without flinching and without claim or right to the immediate restoration of a full return. N. Y. Commission. Re Queens Borough Gas & E. Co., P. U. R. 1918 F, 872, 881.

In COLUMBUS RY. POWER & L. Co. vs. COLUMBUS, the Court said:

> "The Company seeks now by its own action to terminate the contracts, still binding upon it by their terms, as to rates of fare to be charged, and seeks to have the aid of a court of equity by enjoining the same from any further requirement of service under them. There is no showing that the contract had become impossible of performance.

> *Nor is there any allegation establishing the fact that taking the whole term together, the contracts will be necessarily unprofitable."*

and again:

> "There is no showing in the bill that the War or the award of the War Labor Board necessarily prevented the performance of the contract. Indeed, as we have said, there is no showing and, in the nature of things, there cannot be, that the performance of the contract, taking all the years of the term together, will prove unrenumerative."

We have seen that the arrangement of 1917 between the City and plaintiff was made while abnormal conditions prevailed and the obligation to maintain existing rates of fare and regulations was assumed by the Company with knowledge of existing conditions, and notice that such conditions might in the near future become worse.

Since the enactment of the ordinance of 1917 the City had done no act and taken no steps which would render this obligation of the Company more onerous. The City neither decreased the rate of fare agreed upon nor made more stringent the regulations assented to. The position of the Company, as far as any act or omission upon the part of the City is concerned, occupies the same position it occupied when it requested and procured the enactment of the ordinance of 1917. Whatever evil has come to the Company cannot be laid at the door of the City or its inhabitants and, it appears, from the contention of plaintiff that the conditions of which it complains are due to circumstances which neither the City nor the Company can control, that is to say, the higher cost of labor and material or, if you please, the diminished purchasing power of the American dollar. Certainly the City has not caused nor

contributed to the increased price of labor or material or the diminished efficiency of the coin of the country.

If the rate of fare and regulations agreed upon in 1899 and, again in 1917, by the parties are now inadequate or impracticable, such inadequacy and impractibility are not chargeable to the municipality nor its inhabitants nor ought they be held responsible for it or be compelled to make changes in the existing arrangement or incur sacrifices in aid of the other party.

IN COLUMBUS R. POWER & LIGHT CO. vs. COLUMBUS, *supra*, the Court further said:

> "There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently became impossible, or pay damages for the non-performance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. * * * It certainly was not intended to question the principle frequently declared in decisions of this Court, that if a party charge himself with an obligation possible to be performed, he must bide by it unless performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties will not excuse performance."

Applying this principal to the facts in this case, the Supreme Court further said:

> "In the present case the terms of the contract are not doubtful. The terms for which the company was given the right to use the streets of the city was definitely stated, and the terms, including the rates of fare which the company might charge, were explicitly laid down. There is no occasion to interpret general terms in the light of the intention of the parties or the circumstances of the case."

In the recent case of MUSCATINE LIGHTING CO. vs. CITY OF MUSCATINE, 256 Fed. Rep., 929, the Court said:

"It is, of course, important that utility companies shall receive reasonable compensation for what is furnished. Upon the showing before the Court it is apparent that some of the companies cannot continue under the contract rates, because they have no source of income, except the money received for the commodity furnished, and war conditions have radically increased the cost of production, so that a rate fixed at the time a franchise was granted a few years ago may be utterly inadequate at the present time to pay even current expenses; but these are conditions which the Court cannot relieve, as has been recently held in Columbus Co. vs. City of Columbus, 253 Fed., 499, and other cases. But there are other considerations. These cases are brought upon the claim that because the rates are confiscatory, the utility companies are deprived by the state of property without the due process of law, and that they are denied the equal protection of the law.

The Courts are ever ready to enforce the provisions of the Constitution of the United States; but, in order to interfere with state or municipal legislation it must appear that there is *some affirmative act* which constitutes the 'deprivation' or the 'denial' specified in article 14. When an ordinance is passed by the City Council under authority of the State, it is an act of the State and if it deprives one of his property without due process, or denies equal protection, the act will be enjoined for the constitution is sacred and must under all circumstances, be upheld."

"But has the State, or the municipality, in these cases done any act which violates the *Constitution, except in so far as such action has been consented to by the companies?* It is fundamental that every individual constitutional right may be waived."

"A person may, by his acts or omission to act, waive a right which he may otherwise have under the provisions of a Constitution; and where such acts or omissions have intervened, a law may be sustained which otherwise might have been held invalid, if the party making the objection had not by prior acts precluded himself from being heard in opposition. Thus a person who has participated in proceedings under a statute, or who has acted under that statute and in pursuance of the authority conferred by it, or who has claimed the benefit of the statute to the detriment of others, or who asserts rights under it, may not question its constitutionality." 12 Corpus Juris, 769 and cases cited.

"It must be apparent that if the confiscatory rate is fixed, not by the municipality, but by the utility company, the State has done no act 'depriving' the company of its constitutional rights. It must likewise be apparent that if the rate is the joint act of the utility company and the city, if the utility company has consented to the rate, that it has waived the constitutional right which it might otherwise assert, and I am convinced that if a rate is fixed by agreement of the utility company, *which at the time is a reasonable rate*, but which thereafter becomes confiscatory, *without any act of the state*, but simply as a *result of industrial conditions*, that the prohibition of the Fourteenth Amendment upon the State is not violated by the State."

"This is a serious business, restraining the sovereign act of a State. There is no constitutional guaranty of compensatory rates. So far as income and profits were concerned, the utility corporation stands exactly in the same position as the building corporation, or the street improvement company. It may make money—it may lose money; but only when the State has acted affirmatively to the deprivation of reasonable income upon actual investment, can constitutional guaranty be invoked; and where the utility company consents to the act of

the state, there is not that 'deprivation' or 'denial' which the Constitution forbids."

In the case in bar both parties consented during the existence of the abnormal condition specified, to the rate and regulations attached in plaintiff's bill. By no affirmative act of the State or municipality were the rate and regulations changed without the consent of the Company or its predecessors. The rate and regulations were not only expressly agreed to by the Company, but were by the Company actually acquiesced in and confirmed for a long period of years. They are, in effect, the same today as they were in 1899, with the exceptions of the half rate for children and corresponding transfers provided for by the State and city legislation in 1903. It is, therefore, clear that the changes in conditions, as already pointed out, are not due to any affirmative act of state or city, but are due to a change in industrial conditions over which neither the State nor the city can exercise control. Can it be properly or truthfully stated, in this case, that either the State or the city has, by its afrimative act, deprived plaintiff of its property without due process of law, or has denied or is denying plaintiff the equal protection of the laws?"

VI.

THAT THE ACTION OF THE STATE IN PASSING THE HALF FARE LAW DOES NOT VACATE OR AVOID THE CONTRACT, BUT SIMPLY CONSTITUTES A REGULATION OF IT WHICH REGULATION IS SUBJECT TO REVIEW BY THE COURTS SHOULD OCCASION WARRANT.

But the Complainant contends that the action of the State in passing the half fare law contested in the Altgelt

case avoids its agreement with the city and sets the contract at naught.

Appellants admit no such conclusion. Under the law as it existed in 1899, the contract was undoubtedly controllable by the State. It was not, however, subject to absolute destruction as is clearly shown by the decision of the Supreme Court of Texas in the Houston case, 83 Texas. Moreover, the right to regulate and control which was exercisable by the State was limited as shown by the decision in the Altgelt case for this court there says:

> "Under the Bill of Rights of that Constitution the Legislature could not reduce the fares to a confiscatory amount, or to an amount which would render it unprofitable to operate the road. There is no allegation of that kind in this bill, and no evidence that the reduction of the school tickets in question would seriously impair its revenues. Indeed it was found in the opinion of the Court below that it was not contended there, and that there was nothing in the evidence tending to show, that the rate of fare claimed by the appellee under the act of 1903, is not such as to leave to the company a sufficient income to pay for repairs and a fair income on its investment."

The mere fact that the agreement was subject to this control by the Legislature did not keep it from being a contract and did not avoid it. The parties entered into the agreement charged with notice of the fact that the franchise and special provisions granted were subject to the future control by the Legislature. The agreement was not subject, however, to change by the parties. The right to regulate and control it being exclusively reserved to the Legislature of the State.

If the regulation imposed by the State is confiscatory the Company might have just grounds to complain in a

court of equity of that regulation. A suit might be instituted in such a court under the decision in the Altgelt case against the half-fare law if that law is now taking the Complainants property without due process, but the San Antonio Public Service Company cannot, simply because of this half-fare law brush its entire contract aside and say that for the future it will operate upon the streets of the City of San Antonio without restriction or limitation.

VII.

CONCLUSION.

It is a strange commentary on the mutability of human affairs when we consider the position taken by appellee's counsel in this case. When we turn to the briefs in the Altgelt case, both in the Court of Civil Appeals of Texas and in this Court we find the counsel for the Complainant's predecessor, earnestly asserting that the franchise ordinance was a contract, and that the city had full power to make it. *"Tempora mutantur, et nos mutamur in illis."*

Today we find them as earnestly asserting that it was not a contract and if it was a contract the city was without power to enter into it. Yet no court in the meantime has said it was not a contract, and no court has held that the city was powerless in the premises, until the decision of the district court in the case at bar. Appellants submit that in this holding the learned judge was in error.

They pray this Court to reverse his decision and order the bill dismissed. In the alternative they pray the Court to reverse and render the case in their favor or, refusing this, to reverse and remand the case for new trial.

Respectfully submitted,

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